In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-979

IRVING J. THORNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. In July 1942, petitioner enlisted in the Naval Reserve. In July 1943, after a board of medical survey found that he had several physical disqualifications, petitioner was released from active duty, and one month later he was honorably discharged. In December 1943 and again the following year, he applied to the Veterans Administration for disability compensation, but his applications were denied. In August 1945, upon presentation of additional medical proof, the Veterans Administration awarded petitioner a 20 percent disability rating, which, in 1947, was increased to 40 percent.

In May 1946, a Naval Medical Survey Review Board recommended that petitioner not be authorized to appear before a Naval Retiring Board. This recommendation was approved by the President, and petitioner was so informed by letter dated November 15, 1946.

In November 1955, the Board for Correction of Naval Records denied petitioner's application to correct his service record to show retirement by reason of physical disability.

In December 1971, 25 years after he was refused a retiring board and 16 years after the adverse decision of the correction board, petitioner filed a petition in the Court of Claims, seeking disability retirement pay based on a 100 percent disability rating from the date of his discharge from the Naval Reserve to the date of judgment in this action. The Court of Claims dismissed the suit as untimely.

2. Petitioner's claim is barred by the relevant six-year statute of limitations. 28 U.S.C. 2501. A claim for disability retirement pay accrues on final action of a board competent to pass upon eligibility for disability retirement, or upon refusal of a request for such a board. *Friedman* v. *United States*, 159 Ct. Cl. 1, 310 F. 2d 381, certiorari denied *sub nom. Lipp* v. *United States*, 373 U.S. 932. Petitioner's claim thus accrued not later than November 15, 1946, when he was refused an appearance before a Naval Retiring Board. His later applications to other boards and agencies did not toll the running of the statute. *Friedman, supra; O'Callahan* v. *United States*, 196 Ct. Cl. 556, 451 F. 2d 1390. Therefore, as the Court of Claims correctly determined, petitioner's claim, filed 25 years after it accrued, was untimely.

The cases relied upon by petitioner are not to the contrary. *Versaci* v. *United States*, 403 F. 2d 246 (Ct. Cl.), *Merson* v. *United States*, 173 Ct. Cl. 92, 401 F. 2d 184, and *Beckham* v. *United States*, 392 F. 2d 619 (Ct. Cl.), deal only with whether the court may consider, in a timely filed petition, new evidence of the claimant's physical condition which was not in the administrative record.

In each of the other cases—*Harper* v. *United States*, 310 F. 2d 405 (Ct. Cl.); *Farrar* v. *United States*, 358 F. 2d 965 (Ct. Cl.); *Grubin* v. *United States*, 166 Ct. Cl. 272, 333 F. 2d 861; *Woodard* v. *United States*, 167 Ct. Cl. 306—the claimant had not requested nor been denied an appearance before a retiring board, and the claim had been filed within six years of the decision of the correction board, the first competent board to rule on the alleged disability. Petitioner, by contrast, was denied a retiring board in 1946, and his claim accrued at that time. Moreover, even if the statute did not commence running until the correction board's decision in 1955, petitioner's claim was still untimely because it was not filed until 16 years after that decision.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.